The Five-Year Residence Requirement for Naturalization. Its Operation and Employment-Related Exceptions and Ameliorations

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Abstract

Congress, since the first naturalization statute, has insisted that aliens pass through a trial period of residence in the United States before they are admitted to citizenship pursuant to article one, section eight, clause four, of the Constitution.

KEYWORDS: employment, naturalization, residence
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I. Introduction

Congress, since the first naturalization statute, has insisted that aliens pass through a trial period of residence in the United States before they are admitted to citizenship pursuant to article one, section eight, clause four, of the Constitution. Until 1929, the courts generally construed the residence requirement favorably to the alien, thus making any need for the amelioration or waiver of the required residence largely unnecessary. With the institution in 1929 of more stringent requirements as to the continuity of this residence, the need for exceptions and ameliorations for reasons purely in the national interest became apparent. Presently, if an alien desiring naturalization has to be absent from the United States for reasons relating to his or his spouse's employment, the likelihood of his qualifying for a waiver or amelioration of the five-year residence requirement is present. This article analyzes the present state of the law in this area.


The views expressed in this article are those of the author and do not necessarily reflect those of the United States Department of Justice or any of its divisions, boards or offices.

1. The Act of March 26, 1790, 1 Stat. 103, was the first naturalization statute. This statute imposed a two-year residence requirement as a condition to naturalization. The Act of January 29, 1795, 1 Stat. 414, first imposed the five-year period as a condition for naturalization. Residence is only one of the requirements imposed by the statute as a condition to acquire United States citizenship. A discussion of the other requirements is outside the scope of this article.

2. Citizenship confers upon the former alien the right to integrate himself fully into American society, allowing him to vote, hold public office, transmit the citizenship to his offspring, and travel abroad with the protection of our Government, as well as allow him to engage in certain types of employment reserved for citizens (notably employment with the United States Government). See Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978).
The practical and immediate benefit to the alien of citizenship is that upon becoming a citizen a person cannot be expelled from the United States or barred from entry. Furthermore, he can secure for his relatives benefits which were unavailable while he was simply an alien lawfully admitted for lawful permanent residence.7

The philosophy of the naturalization statutes has always been that naturalization is a bounty and that an alien does not have a right to naturalization unless he meets all the statutory requirements.6 However, if the alien meets the requirements of the Act he is entitled to naturalization, since the naturalization court is not granting or withholding a favor.8

II. Residence Rules

The Act of March 2, 19299 set the first statutory rules of continuity of residence. Prior to this act, an alien needed, in effect, to show only lawful admission for residence and domicile for five years immediately prior to his petition for naturalization without much regard to his actual physical presence in the United States, as long as he was not deemed to have abandoned United States domicile. The rules first promulgated were: (1) an absence from the United States for more that one year would break continuity of residence, (2) an absence of more than six months but less than one year could break the continuity of residence unless satisfactorily explained, and (3), sub silentio, absences for a period of less than six months would not break the continuity of residence.

But matters were not for long satisfactory to Congress. The above mechanics could easily lead to circumvention of the intent of actual presence in the United States for a substantial amount of time as a condition for naturalization. This concern was finally addressed by the Immigration and Nationality Act of 1952 (hereinafter referred to as

3. Sections 201 and 203(a) of the Immigration and Nationality Act of 1952 [hereinafter referred to as "the Act"], 8 U.S.C. §§ 1151 and 1153(a), allow citizens but not lawful permanent resident aliens to confer benefits on their siblings and parents.


7. The 1929 Act responded to situations such as the one exemplified by United States v. Dick, 291 F. 420 (1923), where the alien spent a minuscule amount of time in

8. The term United States is defined. Section 101(a)(38) presently states: "The term 'United States,' except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States. For the purpose of issuing certificates of citizenship to persons who are citizens of the United States, the term 'United States' as used in section 341 of this Act includes the Canal Zone." According to section 506(c) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, the Northern Mariana Islands is a part of the United States and a State for purposes of immediate relative status determinations and judicial naturalization, effective upon the establishment of the Commonwealth of the Northern Mariana Islands. See 48 U.S.C. § 1681 note. The President declared the Commonwealth of the Northern Mariana Islands established as of Nov. 4, 1986. 51 Fed. Reg. 40,399 (1986). See also Application of Reyes, 140 F. Supp. 130 (Haw. 1956), for an application of this definition.

9. In Beymer v. United States, 83 F.2d 276 (9th Cir. 1936), an alien was lawfully admitted for permanent residence in 1892, and then unlawfully entered in 1907, since he had committed a crime which made him excludable. See also In Re Scrivener, 9 F. Supp. 478 (W.D.N.Y. 1935). Entry is a defined term. See Section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13); Rosenberg v. Fleuti, 374 U.S. 449 (1963), and its progeny should also be consulted. The fact that deportation proceedings may not have been instituted is immaterial; section 318 of the Act, 8 U.S.C. § 1429, does not make the Attorney General's administrative determinations binding on the naturalization court. However, at least one circuit court has recently opined, albeit in a different context, that lawful permanent residence terminates only upon a final administrative decision stripping the alien of such status. See Rivera v. INS, 810 F.2d 540 (5th Cir. 1987). Also, the regulations in force permit an immigration judge to terminate deportation proceedings against an otherwise deportable alien so as to allow him to proceed to naturalization. 8 C.F.R. § 242(e) (1987).
The practical and immediate benefit to the alien of citizenship is that upon becoming a citizen a person cannot be expelled from the United States or barred from entry. Furthermore, he can secure for his relatives benefits which were unavailable while he was simply an alien lawfully admitted for lawful permanent residence. The philosophy of the naturalization statutes has always been that naturalization is a bounty and that an alien does not have a right to naturalization unless he meets all the statutory requirements. However, if the alien meets the requirements of the Act he is entitled to naturalization, since the naturalization court is not granting or withholding a favor.

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"The Act"), which amended the residence requirement language to provide that for at least one-half of the period for which residence is required the petitioner for naturalization must have been physically present in the United States.

The residence required for naturalization must result from a lawful admission to permanent residence. Even though an alien may have been lawfully admitted for permanent residence, a subsequent entry which would be unlawful under the immigration laws may bar approval of the application.

III. Exceptions

The statutory provisions discussed immediately hereafter waive or substitute the five-year residence requirement. The alien falling within the statutorily benefitted class can be naturalized in a term shorter than five years from lawful admission for permanent residence.

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Provisions which ease compliance of the five-year term of residence are discussed below. For ease of analysis, these latter provisions are referred to herein as ameliorations.

A. First Exception: Spouses of United States Citizens

The exception for spouses of United States citizens is not employment-related. However, other exceptions and ameliorations of the five-year residence requirement to be discussed here depend on the existence of a marital union with a United States citizen. The case law as to recognition of the marital union for this exception is germane to the other provisions here discussed. Furthermore, it is one of the most widely used exceptions. Therefore, a discussion of this provision is warranted.

The immigration statutes were at one time extremely sexist in this regard. The Cable Act of September 22, 1922, eliminated the automatic grant of citizenship to wives of United States citizens and required them to seek judicial naturalization; as originally drafted, only one year of residence was required.13 The Act of May 24, 1934,14 limited this measure of relief to spouses of citizens by providing for a three-year term of residence to qualify for naturalization.

The present statute15 retains for spouses of citizens of the United States the residence requirement of three years set by the 1934 Act. The physical presence required in the United States is lowered to one year and six months. The petitioner for naturalization must live in "marital union" with the spouse and the spouse must be a United States citizen throughout the three-year period immediately preceding the petition.

Although the statutory language is fairly straightforward, there has still been a need for judicial construction. First, courts have had to reiterate that the benefits are intended for participants in lawful marriages. Second, "marital union" has had to be defined. A long separation immediately prior to the filing of the petition for naturalization, where the spouses intended the separation to be permanent, will bar the obtaining of benefits under section 319(a) of the Act.16 On the other hand, a separation short in duration and relating to family discord and incidents which occurred in the past and resulted in reconciliation will not bar the favorable operation of this section.17

At least one court has opined, "Surely, preservation of the family unit should be our touchstone in constructing the phrase 'in marital union.' And just as surely our inquiry should begin and end with a valid marriage, entered into in good faith, and still continuing and in existence as a legal status."18 But it seems that the more favored view is that for the benefits of section 319(a) of the Act to accrue, a close, continuing marital relationship must be present throughout the three-year period immediately prior to the filing of the petition for naturalization.19

10. The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, signed by the President on November 6, 1986, contains what the section 309(h)(5)(B) of this Act requires that persons granted lawful permanent resident status as seasonal agricultural workers must work as seasonal agricultural workers at least ninety days during each of the five years of residence to qualify for naturalization.

11. There are some limitations in the parallel interpretations of section 319(a) of the Act, 8 U.S.C. § 1430(a), and the other sections where marriage is one of the elements relevant to obtaining the benefit. Obviously, the same reasons that require the departure from the United States of the citizen spouse which justify eligibility for the benefits of section 319(b) of the Act, 8 U.S.C. § 1430(b), may occasion the separation of the spouses. The benefits of section 319(d), 8 U.S.C. § 1430(d), are for widows; one cannot speak in terms of an existing marital union at the time of applying for naturalization.

12. 42 Stat. 1021. The automatic grant of United States citizenship to wives of male American citizens was provided by the Act of February 10, 1855, Sec. 1994 of the Revised Statutes, repealed by the Cable Act.

13. 48 Stat. 797.

14. Section 319(a) of the Act, 8 U.S.C. § 1430(a) reads:

Any person whose spouse is a citizen of the United States may be naturalized upon compliance with all the requirements of this title except the provision of paragraph (1) of section 316(a) if such person immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least three years, and during the three years immediately preceding the date of filing his petition has been living with the citizen spouse, who has been a United States citizen during all of such period, and has been physically present in the United States for periods totaling at least half of that time and has resided within the State in which he filed his petition for at least six months.

15. In In Re Chong Jab Alix, 252 F. Supp. 313 (D. Haw. 1965), the court denied the petition for naturalization of the spouse of a United States citizen because the divorce obtained by the United States citizen to marry the petitioner was not recognized by his state of domicile at the time, thus making the present marriage void.


18. Id. at 891.

19. Petition of Bashan, 530 F. Supp. at 115; In Re Kostas, 169 F. Supp. 77 (D.
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10. The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, signed by the President on November 6, 1986, contains what may be the first provision to make it more difficult for a group to comply with the residence requirement. Section 303(a) of this Act requires that persons granted lawful permanent resident status as seasonal agricultural workers must work as seasonal agricultural workers at least ninety days during each of the five years of residence to qualify for naturalization.

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B. Second Exception: Spouse of United States Citizens Who Enter into Qualified Overseas Occupations

Section 319(b) of the Act contains the most generous exception to the residence requirement available to any group of petitioners for naturalization. This section in effect waives all periods of residence for spouses of United States citizens who take up employment abroad with (1) the Government of the United States, (2) an American institution of research, (3) American enterprises engaged in trade and commerce abroad, (4) international organizations of which the United States is a party, or (5) organizations, which must have an establishment in the United States, which direct them to go abroad as ministers of religion, priests or missionaries.

Under this section the only requirement of residence is lawful admission for permanent residence under the immigration laws and physical presence in the jurisdiction of the Naturalization Court at the time of admission to citizenship. The statute also contains a subjective residence test: intention to take up United States residence upon termination of the spouse's employment abroad.

The first issue to be adjudicated is the existence of a valid marriage.

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20. Section 319(b) of the Act, 8 U.S.C. § 1430(b), reads:

(b) Any person, (1) whose spouse is (A) a citizen of the United States, (B) in the employment of the Government of the United States or of an American institution of research recognized as such by the Attorney General, or of an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof, or of a public international organization in which the United States participated by treaty or statute, or is authorized to perform the ministerial or priestly functions of a religious denomination having a bona fide organization in the United States, or is engaged solely as a missionary by a religious denomination or by an inter-denominational mission organization having a bona fide organization within the United States, and (C) regularly stationed abroad in such employment, and (2) who is in the United States at the time of naturalization, and (3) who declares before the naturalization court in good faith an intention to take up residence within the United States immediately upon the termination of such employment abroad of the citizen spouse, may be naturalized upon compliance with all the requirements of the naturalization laws, except that no prior residence or specified period of physical presence within the United States or within the jurisdiction of the naturalization court or proof thereof shall be required.

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riage, without which the section does not come into play. In analyzing the marriage validity issue, the recognition of any prior divorce by the domiciliary jurisdiction will be analyzed as well as the formalities of the marriage celebration.

Although military service was at one time questioned as qualifying employment for the application of the predecessor of Section 319(b) of the Act, most reported cases analyzing the mechanics of this section have been decisions on the petitions of spouses of members of the Armed Forces.

The statute has not been interpreted liberally as it concerns qualifying employment. "Commerce and Trade" does extend to callings not traditionally considered of a mercantile nature.

An area of considerable interpretation has been the presumed need to reside abroad with the citizen spouse. The regulations state that the petitioner must establish that he intends "upon naturalization to reside abroad with the United States citizen spouse." The only judicial interpretations in this area concern spouses of military personnel stationed in hazardous areas, where the courts have read the statute as requiring living abroad where it is impossible to live with the spouse. But one court has stated:

In addition to the situation presented by the case sub judice, in which the alien spouse cannot join the citizen spouse by reason of

25. In re Fang Lan Dangowski, 478 F. Supp. 1203 (D. Guam 1979), the court refused to grant benefits under this section to the spouse of a teacher at the Taipei American School, an institution of obviously immense benefit to our country's presence in Taiwan and which liberally received funds from the Department of State; this refusal is rather short-sighted since, considering the programmed de-emphasizing of official ties to Taiwan, an institution providing such needed help to children of American citizens undoubtedly directly engaged in trade or commerce must by necessity be "engaged in whole or in part in the development of foreign trade and commerce of the United States" (emphasis added).
27. See cases cited supra note 24.
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22. For a full discussion of the marriage validity issues see 2 C. Gordon & H. Rosenfield, IMMIGRATION LAW AND PROCEDURE § 7.18 (1967).
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restrictions imposed by the United States Government, this Court can envision analogous situations in which residence together is rendered difficult or undesirable because of the location of the citizen spouse’s employment. Nevertheless, residence abroad by the alien spouse may be necessitated by economic conditions, or the desirability of having the alien spouse reside near the citizen spouse’s place of employment and with relatives or friends. These too are “enforced absences” from the United States, the very situation which Congress sought to remedy by the enactment of 319(b).

C. Third Exception: Service in the Armed Forces

Section 328(a) of the Act provides that an alien who serves honorably in the armed forces continuously for at least three years and who files for naturalization while still in service or within six months thereafter may be naturalized without regard to residence. This section, in effect, may lower the period of required physical presence to zero; the qualifying service need not be in the United States nor after acquisition of permanent resident status. The regulations promulgated thereunder clearly establish that there must be a lawful admission for permanent residence before the petition for naturalization is filed. Form N-426 (Certification of Military or Naval Service) is utilized to comply with the proof of required qualifying honorable service in the Armed Forces demanded by Section 328(e) of the Act.

Section 329(a) is an especially generous provision of the Act. It waives all residence and physical presence requirements for naturalization for aliens who have served honorably in the armed forces in an active duty status during periods of war or designated periods of military hostilities. Since naturalization may be granted before the service has been concluded, the alien may be denaturalized if he separates from service.

32. Id. at 1051.
34. 8 U.S.C. § 1439(e).
35. 8 U.S.C. § 144, as applicable, reads:
Any person who, while an alien or noncitizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I [as defined in section 101(d)(2)(A)] or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, or during a period beginning February 28, 1961, and ending on a date designated by the President by Executive order as the date of termination of the Vietnam hostilities, or thereafter during any other period which the President by Executive order shall designate as a period in which the Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section of (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether persons who have served honorably in an active duty status, and whether separation from such service was under honorable conditions:
Provided, however, That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section. No period of service in the Armed Forces shall be the basis of a petition for naturalization under this section if the applicant has previously been naturalized on the basis of the same period of service.

The Act of December 29, 1981, 95 Stat. 1619, amended section 316(b) of the Act to grant these benefits to the spouses and dependents of unmarried sons and daughters of the aliens eligible for benefits under this section.
restrictions imposed by the United States Government, this Court can envision analogous situations in which residence together is rendered difficult or undesirable because of the location of the citizen spouse's employment. Nevertheless, residence abroad by the alien spouse may be necessitated by economic conditions, or the desirability of having the alien spouse reside near the citizen spouse's place of employment and with relatives or friends. These too are "enforced absences" from the United States, the very situation which Congress sought to remedy by the enactment of 319(b). 29

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39. Id. at 1051.
30. 8 U.S.C. § 1439(a) reads:
A person who has served honorably at any time in the Armed Forces of the United States for a period or periods aggregating three years, and who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years, and in the State in which the petition for naturalization is filed for at least six months, and without having been physically present in the United States for any specified period, or such petition is filed while the petitioner is still in the service or within six months after the termination of such service.

31. Considerable litigation has arisen in connection with the earlier statutes. It is not profitable to discuss the issues raised because (1) the present statute does not give language except as it is still reflected in the present statute. For a thorough discussion on this topic see 3 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 17.5 (1987).
32. Typically it will be after; 10 U.S.C. §§ 3253 and 8253 prohibit enlistment of aliens in peacetime unless they are lawful permanent residents.
from the service under less than honorable conditions. 36. The last period of military hostilities for purposes of this section was the Grenada campaign, which was designated as a period of hostilities for purposes of section 329 of the Act by Executive Order 12,582 of February 2, 1987. 37.

D. Fourth Exception: Widows of United States Servicemen

Section 319(d) of the Act 38 waives all period of residence for naturalization of widow(er)s of active duty servicemen. It requires that the petitioner for naturalization be living in marital union with the deceased United States citizen at the time of his demise and while he was serving honorably in the Armed Forces. The only residence requirement is lawful admission for permanent residence and physical presence in the jurisdiction of the Naturalization Court.

To be a surviving spouse, the marriage must be valid. 39 Living "in marital union" must be interpreted in light of the judicial decisions interpreting section 319(a) of the Act discussed above. Since Form N-400 (Certification of Military or Naval Service) is designed to secure military records of the petitioner himself, active duty status and honorable service would be established by documentation secured by the spouse directly from the Armed Forces.

E. Fifth Exception: Extraordinary Contributors to the National Security or Intelligence Activities

Persons who have assisted our national security interests have long been granted special consideration under our immigration laws. 40 However, it was not until December 4, 1985, that general legislation was enacted to accord persons who have contributed significantly to our national security or intelligence activities the right to be naturalized expeditiously. Section 316(g) of the Act 41 provides that, upon the concurrence of the Director of Central Intelligence, the Attorney General, and the Commissioner of Immigration, an alien may be naturalized without regard to the residence and physical presence requirements if the alien has continuously resided in the United States for at least one year prior to the naturalization. The statutory language uses "residence" twice in a manner that creates an apparent contradiction. In the absence of authoritative interpretation of this section, the contradiction can be solved by interpreting the "residence and physical presence"

36. Section 329(c) of the Act, 8 U.S.C. § 1440(c), provides: Citizenship granted pursuant to this section may be revoked in accordance with section 340 of this title if at any time subsequent to naturalization the person is separated from the military, air, or naval forces under other than honorable conditions, and such ground for revocation shall be in addition to any other provided by law. The fact that the naturalized person was separated from the Service under other than honorable conditions shall be proved by a duly authenticated certification from the executive department under which the person was serving at the time of separation.

37. This executive order limits benefits to persons actually serving in direct support of the military operations in Grenada. The last general availability of hostilities period was the Viet Nam episode which ended Oct. 15, 1978, by Executive Order No. 12081, 43 Fed. Reg. 42,237 (1978).

38. 8 U.S.C. § 1430(d) reads: Any person who is the surviving spouse of a United States citizen, whose citizen spouse dies during a period of honorable service in an active duty status in the Armed Forces of the United States and who was living in marital union with the citizen spouse at the time of his death, may be naturalized upon compliance with all the requirements of this title except that no prior residence or specified physical presence within the United States, or within the jurisdiction of the naturalization court shall be required.

from the service under less than honorable conditions.\textsuperscript{36} The last period of military hostilities for purposes of this section was the Grenada campaign, which was designated as a period of hostilities for purposes of section 329 of the Act by Executive Order 12,582 of February 2, 1987.\textsuperscript{37}

D. Fourth Exception: Widows of United States Servicemen

Section 319(d) of the Act\textsuperscript{38} waives all period of residence for naturalization of widow(er)s of active duty servicemen. It requires that the petitioner for naturalization be living in marital union with the deceased United States citizen at the time of his demise and while he was serving honorably in the Armed Forces. The only residence requirement is lawful admission for permanent residence and physical presence in the jurisdiction of the Naturalization Court.

To be a surviving spouse, the marriage must be valid.\textsuperscript{39} Living “in marital union” must be interpreted in light of the judicial decisions interpreting section 319(a) of the Act discussed above. Since Form N-426 (Certification of Military or Naval Service) is designed to secure military records of the petitioner himself, active duty status and honor-

E. Fifth Exception: Extraordinary Contributors to the National Security or Intelligence Activities

Persons who have assisted our national security interests have long been granted special consideration under our immigration laws.\textsuperscript{40} However, it was not until December 4, 1985, that general legislation was enacted to accord persons who have contributed significantly to our national security or intelligence activities the right to be naturalized expeditiously. Section 316(g) of the Act\textsuperscript{41} provides that, upon the concurrence of the Director of Central Intelligence, the Attorney General, and the Commissioner of Immigration, an alien may be naturalized without regard to the residence and physical presence requirements if the alien has continuously resided in the United States for at least one year prior to the naturalization. The statutory language uses “residence” twice in a manner that creates an apparent contradiction. In the absence of authoritative interpretation of this section, the contradiction can be solved by interpreting the “residence and physical presence”

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\item[36.] Section 329(c) of the Act, 8 U.S.C. § 1440(c), provides:
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\item[39.] See In Re Chang Jah Alix, 252 F. Supp. at 313.
\item[40.] Section 7 of the Act of June 20, 1949, 63 Stat. 208, as amended, codified at 50 U.S.C. § 403b, permits the Director of the Central Intelligence Agency, the Attorney General, and the Commissioner of Immigration and Naturalization to admit aliens for permanent residence without regard to their admissibility under the immigration laws whenever they deem the entry of such aliens to be in the interest of national security or essential to the furtherance of the national intelligence mission. The number of aliens and their relatives so admitted is limited to 100 per year.
\item[41.] 8 U.S.C. § 1426(g) in pertinent part reads:
\item[] (1) Whenever the Director of Central Intelligence, the Attorney General and the Commissioner of Immigration determine that a petitioner otherwise ineligible for naturalization has made an extraordinary contribution to the national security of the United States or to the conduct of United States intelligence activities, the petitioner may be naturalized without regard to the residence and physical presence requirements of this section, or to the prohibitions of section 1424 of this title, and no residence within the jurisdiction of the court shall be required: Provided, That the petitioner has continuously resided in the United States for at least one year prior to naturalization: Provided, further, That the provisions of this subsection shall not apply to any alien described in subparagraphs (A) through (D) of section 1253(h)(2) of this title.
\item[](2)
\item[](3) The number of aliens naturalized pursuant to this subsection in any fiscal year shall not exceed five
waived to refer to the residence and physical presence required of other aliens after acquisition of lawful permanent residence status for naturalization; in contrast, the continuous residence of one year required may refer to the alien making the United States his domicile in fact for the one year immediately prior to his naturalization. Congress has limited this avenue of relief to only five aliens per year.

F. Sixth Exception: Alien Children Adopted by United States Citizens

In a radical departure from the established norm of requiring judicial naturalization of all individuals who are to become United States citizens after birth,42 Congress passed legislation (signed by the President on November 14, 1986)43 which contains a new provision44 that provides for naturalization on the basis of a purely administrative petition. This procedure is available to alien children who are (1) adopted while under sixteen years of age by United States citizens, (2) lawfully admitted for permanent residence, (3) residing in the United States in the custody of the United States adoptive parents at the time of the filing of the application for citizenship, and (4) under eighteen years of age at the time their parents apply for citizenship on their behalf. This provision dispenses with any term of residence in the United States as a condition for naturalization, requiring only presence in the United States at the time of administrative application for a certificate of United States citizenship, which constitutes ipso facto the application for naturalization.45

IV. Amelioration Provisions

The following provisions of our statutes make it easier to comply with the requirement of five years of continuous residence immediately prior to the filing of the petition for naturalization but do not lower the five-year requirement and are, therefore, for analytical ease discussed separately. Unlike the waiver provisions previously discussed, they do not allow the alien to apply for citizenship until after five years of lawful permanent resident status.

A. First Amelioration: Aliens Proceeding Abroad on Qualified Employment and Their Families

The second paragraph of Section 316(b) of the Act,46 which is

42. Collective naturalization, the procedure utilized by Congress to grant United States citizenship to entire classes of former aliens, generally upon acquisition of new territory by the United States, is outside the scope of this article.


44. This provision, to be codified as section 341(b) of the Act, reads:
(1) The adoptive citizen parent or parents of a child described in paragraph (2) may apply to the Attorney General for a certificate of citizenship for the child. Upon proof to the satisfaction of the Attorney General that the applicant and spouse, if married, are citizens of the United States, whether by birth or naturalization, and that the child is described in paragraph (2) the child shall become a citizen of the United States and shall be furnished by the Attorney General with a certificate of citizenship, but only if the child is at the time within the United States.
(2) A child described in this paragraph is a child born outside of the United States who:
(A) is under the age of 18 years,
(B) is adopted before the child reached the age of 16 years by a parent who is a citizen of the United States, or the child, either by birth or naturalization, and
(C) is residing in the United States in the custody of the adopting citizen parent, or the child was lawfully admitted for permanent residence.

45. As previously utilized, an application for a certificate of citizenship was submitted only by persons who acquired United States citizenship by reason other than birth or naturalization in the United States. Typically, the certificate of United States citizenship was requested by a person born to parents at least one of whom could transmit United States citizenship to him or her offspring. The certificate of citizenship merely declared that the person had acquired United States citizenship at some time prior to the application for the certificate and the procedure was considered merely a convenience. Now a certificate of citizenship application will by itself constitute an application for citizenship by a person within the United States, which procedure has traditionally been termed naturalization. The fascinatingly complex area of acquisition of United States citizenship through the parents, an area of the law that has been constantly changing through legislation over the years, is outside the scope of this article.

46. 8 U.S.C. § 1427(b)(2) reads: [A] absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship (whether preceding or subsequent to the filing of the petition for naturalization) shall break the continuity of such residence except that in the case of a person who has been physically present and residing in the United States after being lawfully admitted for permanent residence for an uninterrupted period of at least one year and who thereafter, is employed by or under contract with the Government of the United States or an American institution of research recognized as such by the Attorney General, or is employed by an American firm or corporation en-
waived to refer to the residence and physical presence required of other aliens after acquisition of lawful permanent residence status for naturalization; in contrast, the continuous residence of one year required may refer to the alien making the United States his domicile in fact for the one year immediately prior to his naturalization. Congress has limited this avenue of relief to only five aliens per year.

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(2) A child described in this paragraph is a child born outside of the United States who:

(A) is under the age of 18 years,

(B) is adopted before the child reached the age of 16 years by a parent who is a citizen of the United States, either by birth or naturalization, and

(C) is residing in the United States in the custody of the adopting citizen parent, pursuant to a lawful admission for permanent residence.

45. As previously utilized, an application for a certificate of citizenship was submitted only by persons who acquired United States citizenship by reason other than birth or naturalization in the United States. Typically, the certificate of United States citizenship was requested by a person born to parents at least one of whom could transmit United States citizenship to his or her offspring. The certificate of citizenship merely declared that the person had acquired United States citizenship at some time prior to the application for the certificate and the procedure was considered merely a convenience. Now a certificate of citizenship application will by itself constitute an application for citizenship by a person within the United States, which procedure has traditionally been termed naturalization. The fascinatingly complex area of acquisition of United States citizenship through the parents, an area of the law that has been constantly changing through legislation over the years, is outside the scope of this article.

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probably one of the longest sentences in the English language, provides that absences from the United States will not be deemed to interrupt continuous residence therein for naturalization purposes where the alien proceeds abroad to be employed with (1) the Government of the United States, (2) a recognized American institution of research, (3) an American firm or Corporation or a 50% owned subsidiary thereof engaged in the development of foreign trade and commerce of the United States, (4) a public international organization of which the United States is a member, (5) a 1981 amendment extended the benefits to the spouse and the dependent unmarried sons and daughters of the employed alien.

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The ameliorative provisions of this section of the Act first came into being in 1936 as an amendment to the 1929 Act regulating continuity of residence required of government employees, employees of American firms, and employees of American institutions of research for purposes of qualifying for naturalization. The statute required approval of the absence by the Secretary of Labor prior to departure or employment except for persons already abroad at the time of passage of the Act. The 1938 amendments to these provisions tightened the requirements by making it a condition to benefit from the amelioration that the alien have resided in the United States for at least a year prior to the departure, a requirement which remains to this day.

Presently, the eligible alien must file Form N-471 (Application to Preserve Residence for Naturalization Purposes) with the Service to secure the approval prior to either employment or one year of absence abroad.

Failure to secure such approval will result in the absence interrupting residence, requiring the accumulation of the required residence anew after return to the United States.

The statute as presently enacted waives for employees of the government of the United States granted benefits under section 316(b) the requirement of physical presence in the United States for at least one half of the required period of residence. The statute further waives the prior one-year uninterrupted period of residence to beneficiaries of the waiver who are employed or under contract with the Central Intelligence Agency, allowing them to substitute any one-year period of physical presence in the United States. A fortiori, the required physical presence is not waived for other beneficiaries of this section.

53. See Schwartz v. United States, 121 F.2d 225 (9th Cir. 1941).
55. In Re Pinners Petition, 161 F. Supp. 337 (N.D. Cal. 1958), two absences, one of five days and one of ten days, were deemed sufficient to interrupt the one-year prior presence in the United States.
56. It is curious to note that 8 C.F.R. § 316.2 provides that the application in Form N-470 may be filed before or after commencement of the employment. See In Re Pinners’ Petition, 161 F. Supp. at 337, for disapproval of this regulation. However, the regulation does have its logic.
57. In Re Pinners Petition, 161 F. Supp. at 337; Petition of Rothschild, 57 F. Supp. 814 (S.D.N.Y. 1944); Schwartz v. United States, 121 F.2d 225 (9th Cir. 1941).
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B. Second Amelioration: Religious Travelling Abroad

Section 317 of the Act provides that ministers of religion and missionaries, brothers, nuns or sisters sent abroad by their organization having an establishment in the United States may be naturalized regardless of their physical presence in the United States provided that (1) they have been admitted for permanent residence before that time and (2) they have been continuously physically present in the United States for at least a year at any time after acquiring status of a permanent resident. This provision does not cover the spouses or offspring of the ministers and missionaries.60

There are no published regulations interpreting this section of the naturalization statute other than the regulation providing for filing of form N-470 to secure the Attorney General’s approval of the absence.61

C. Third Amelioration: Service in the Armed Forces of the United States

Sections 328(c) and (d) provide that an alien not entitled to nat-

59. 8 U.S.C. § 1428 reads:

Any person who is authorized to perform the ministerial or priestly functions of a religious denomination having a bona fide organization within the United States as a missionary, brother, nun, or sister, who (1) has been lawfully admitted to the United States for permanent residence, (2) has at any time thereafter and before filing a petition for naturalization been physically present and residing within the United States for an uninterrupted period of at least one year, and (3) has hereafter been or may hereafter be absent temporarily from the United States in connection with or for the purpose of performing the ministerial or priestly functions of such religious denomination, or serving as a missionary, brother, nun, or sister, shall be considered as being physically present and residing in the United States for the purpose of naturalization within the meaning of Section 316(a), notwithstanding any such absence from the United States, if he shall in all other respects comply with the requirements of the naturalization law. Such person shall prove to the satisfaction of the Attorney General and the naturalization court that his absence from the United States has been solely for the purpose of performing the ministerial or priestly functions of such religious denomination, or of serving as a missionary, brother, nun, or sister.

60. This oversight should have been corrected, as it was for the spouses and offspring of employees of the Government, American commercial and research organizations, and international organizations. See Pub. L. No. 97-116, 95 Stat. 1619.

61. 8 C.F.R. §§ 316.21(b) (1987). Form N-470 may be filed at any time.

62. 8 U.S.C. § 1439(c) and (d) reads as follows:

In the case such petitioner’s service was not continuous, the petitioner’s residence in the United States, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing such petition between the periods of petitioner’s service in the Armed Forces, shall be alleged in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing therein. Such allegations and proof shall be made as to any period between the termination of petitioner’s service and the filing of the petition for naturalization.

The petitioner shall comply with the requirements of section 316(a) of this title, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service within five years immediately preceding the date of filing such petition shall be considered as residence and physical presence within the United States.

63. In McDonald v. United States, 279 U.S. 12 (1929), the Supreme Court interpreted the Act of May 5, 1918, as denying the alien ameliorative provisions to service in all vessels not of American registry. This particular case would have been decided differently today since the present statute makes controlling (1) the home port and (2) ownership of the vessel. Seamen have traditionally received, and in this day rare, disparate treatment under our immigration laws. See, e.g., sections 526(d) and 341(e) of the Act, 8 U.S.C. §§ 1225(a)(7) and 1225(c)(7), where benefits available to seamen are not available to crewmen.

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There are no published regulations interpreting this section of the Naturalization statute other than the regulation providing for filing of Form N-470 to secure the Attorney General’s approval of the absence.

C. Third Amelioration: Service in the Armed Forces of the United States

Sections 328(c) and (d) provide that an alien not entitled to naturalization under the residence exception provisions of 328(a) discussed previously may utilize the service in the armed forces for more than three years, whether continuous or not, as periods of residence within the United States regardless of the place where the alien served. Consequently, even though the alien needs to wait five years after admission for lawful permanent residence to petition for naturalization, any absence from the United States while a member of the armed forces, however long, will not bar naturalization. Service in the armed forces is established by means of Form N-426 filed concurrently with the petition for naturalization.

D. Fourth Amelioration: Service in Certain American-Owned Vessels

The realities of the sea trade have been explicitly recognized by the United States Naturalization statutes since the nineteenth century. In 1918, Congress adopted the rule, subsequently modified, of denying to seamen employed in vessels not of American registry the amelioration provisions then existing.

59. 8 U.S.C. § 1428 reads:
Any person who is authorized to perform the ministerial or priestly functions of a religious denomination having a bona fide organization within the United States as a missionary, brother, nun, or sister, who (1) has been physically present and residing in the United States for permanent residence, has been physically present and residing in the United States for more than one year, and (3) has heretofore been or may be accepted by the United States in connection with religious denomination or the purpose of performing religious services in the United States for the purpose of naturalization within the meaning of Section 316(a), notwithstanding any such absence from the United States, if such absence shall in all other respects comply with the requirements of the Naturalization Act.

60. This oversight should have been corrected, as it was for the spouses and offspring of employees of the Government, American commercial and research organizations, and international organizations. See Pub. L. No. 91-116, 91 Stat. 1619.

61. 8 C.F.R. § 316.21(b) (1987). Form N-470 may be filed at any time.
The present statute, section 330(a)(1) of the Act, provides that service by seamen shall be deemed residence in the United States for purposes of naturalization if the service is aboard a vessel (1) owned by American interests and operated by the Government of the United States of an agency thereof, or (2) with a home port in the United States and registered in the United States or, if registered abroad, owned by a citizen or corporation in the United States after admission for permanent residence.

No action need be taken by the seaman to avail himself of these provisions other than submission at the time of petitioning for naturalization the evidence of service required by the statute.

E. Fifth Amelioration: Employment in Certain Nonprofit Communications Media

Section 319(c) of the Act, adopted in 1967, applies to aliens employed for at least five years after admission for permanent residence by nonprofit organizations incorporated in the United States principally engaged in the dissemination abroad through communications media of information which significantly promotes United States interests, as so determined by the Attorney General; the section provides that such persons may be naturalized while employed by the organization or within six months after termination of the employment. The only requirement as to physical presence is presence in the United States at the time citizenship is conferred.

Presently, only two organizations have been designated as United States incorporated nonprofit organizations principally engaged in conducting abroad through communications media the dissemination of information which significantly promotes United States interests abroad within the purview of Section 319(c) of the Act.

V. Summary and Conclusion

Our naturalization laws have, since the First Congress, provided for a period of residence in the United States preparatory to admission for citizenship. The recognition by Congress of special situations creating hardship to aliens desiring to fully integrate into our society by acquiring citizenship, the advantages of having family members share the same citizenship, and the need to reward service in the armed forces or the need to allay the fears of aliens who would not otherwise serve overseas to the detriment of our national interest, has resulted in the creation of a number of exceptions to and ameliorations of the generally applicable nonprofit organization which is principally engaged in conducting abroad through communications media the dissemination of information which significantly promotes United States interests abroad and which is recognized as such by the Attorney General, and (2) has been so employed continuously for a period of not less than five years after a lawful admission for permanent residence, and (3) who files his petition for naturalization while so employed or within six months following the termination thereof, and (4) who is in the United States at the time of naturalization, and (5) who declares before the naturalization court in good faith an intention to take up residence within the United States immediately upon termination of such employment, may be naturalized upon compliance with all the requirements of this Title except that no prior residence or specified period of physical presence within the United States or any State or within the jurisdiction of the court, or proof thereof shall be required.

63. 8 U.S.C. § 1430(c) reads: (c) Any person who (1) is employed by a bona fide United States incorporated nonprofit organization which is principally engaged in conducting abroad through communications media the dissemination of information which significantly promotes United States interests abroad and which is recognized as such by the Attorney General, and (2) has been so employed continuously for a period of not less than five years after a lawful admission for permanent residence, and (3) who files his petition for naturalization while so employed or within six months following the termination thereof, and (4) who is in the United States at the time of naturalization, and (5) who declares before the naturalization court in good faith an intention to take up residence within the United States immediately upon termination of such employment, may be naturalized upon compliance with all the requirements of this Title except that no prior residence or specified period of physical presence within the United States or any State or within the jurisdiction of the court, or proof thereof shall be required.

The present statute, section 330(a)(1) of the Act, provides that service by seamen shall be deemed residence in the United States for purposes of naturalization if the service is aboard a vessel (1) owned by American interests and operated by the Government of the United States or an agency thereof, or (2) with a home port in the United States and registered in the United States or, if registered abroad, owned by a citizen or a corporation in the United States after admission for permanent residence.

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E. Fifth Amelioration: Employment in Certain Nonprofit Communications Media

Section 319(c) of the Act, adopted in 1967, applies to aliens em-

64. 8 U.S.C. § 1441(a)(1) reads: Any periods of time during all of which a person who was previously lawfully admitted for permanent residence has served honorably or with good conduct, in any capacity other than as a member of the Armed Forces of the United States, (A) on board a vessel operated by the United States, or an agency thereof, the full legal and equitable title to which is in the United States, or (B) on board a vessel whose home port is in the United States, and (i) which is registered under the laws of the United States, or (ii) the full legal and equitable title to which is in a citizen of the United States, or a corporation organized under the laws of and of the several States of the United States, shall be deemed residence and physical presence within the United States within the meaning of section 316(a) of this title, if such service occurred within five years immediately preceding the date such person shall file a petition for naturalization. Service on vessels described in clause (A) of this subsection shall be proved by duly authenticated copies of the records of the executive department or agency having custody of records of such service. Service on vessels described in clause (B) of this subsection may be proved by certificates from the masters of such vessels.

65. Form N-400B is the form required by the regulations, in conjunction with the appropriate employer certifications to obtain the benefits of this section. 8 C.F.R. § 330.1. It is interesting to note that the regulations recognize that the statute confers service in purely private endeavors as evidence of good moral character, attachment to the principles of the Constitution, and favorable disposition to the good order and happiness of the United States, other requirements for naturalization which are not discussed in this article.

66. 8 U.S.C. § 1430(c) reads: (c) Any person who (1) is employed by a bona fide United States incorpo-

ployed for at least five years after admission for permanent residence by nonprofit organizations incorporated in the United States principally engaged in the dissemination abroad through the communications media of information which significantly promotes United States interests, as so determined by the Attorney General; the section provides that such persons may be naturalized while employed by the organization or within six months after termination of the employment. The only requirement as to physical presence is presence in the United States at the time citizenship is conferred.

Presently, only two organizations have been designated as United States incorporated nonprofit organizations principally engaged in conducting abroad through communications media the dissemination of information which significantly promotes United States interests abroad within the purview of Section 319(c) of the Act.67

V. Summary and Conclusion

Our naturalization laws have, since the First Congress, provided for a period of residence in the United States preparatory to admission for citizenship. The recognition by Congress of special situations creating hardship to aliens desiring to fully integrate into our society by acquiring citizenship, the advantages of having family members share the same citizenship, and the need to reward service in the armed forces or the need to allay the fears of aliens who would not otherwise serve overseas to the detriment of our national interest, has resulted in the creation of a number of exceptions to and ameliorations of the general

eral residence requirement for naturalization. The present provisions to
effect these policy choices are neither simple nor balanced among each
other; they are the accretion of almost 200 years of legislation respond-
ing to perceived needs and abuses at different times. They nevertheless
result in an almost complete compendium of responses to virtually
every possible situation in which a valid motive to proceed abroad by a
person desiring integration to our community could exist.

“A Task of No Common Magnitude”: The Founding
of the American Law Institute

William P. LaPlana*

In February 1923 Justice Oliver Wendell Holmes wrote to Harold
Laski:

Some of the virtuous under the call of E[lihu] Root and William
Draper Lewis meet here [in Washington] next week to talk of re-
statement of the law (I believe). . . . I will try to [look in on them]
but I will take no hand and won’t believe till they produce the
goods. You can’t evoke genius by announcing a corpus juris.1

Fortunately for the American Law Institute few leading lawyers shared
Justice Holmes’ skepticism. Over three hundred lawyers, judges, and
law teachers did meet in Washington on February 23, 1923, and enthu-
siastically created the Institute which did indeed concern itself primar-
ily with the collection, arrangement, and restatement of the most im-
portant principles of American case law. That meeting and the
resulting institution were the outgrowth of forces which had been work-
ing for legal reform throughout the preceding two decades. This essay
will trace those forces and try to show how their interplay culminated
in the meeting of February 23, 1923.

I

According to Max Rheinstein, three basic problems have domi-
nated the thinking of American jurists: adaptation of the common law
to the circumstances of the New World; endowing with specific content
the broad prescriptions of the federal Constitution and the adaptation
of those prescriptions to changing social conditions; and the preserva-
tion of the unity of the common law in the face of the multiplicity of

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1. HOMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES